DATE: June 4, 1999

CASE NO.: 1999-CAA-15

IN THE MATTER OF

WALTER R. MOORE,
Complainant

v.

U.S. DEPARTMENT OF ENERGY,
Respondent.

ORDER

This matter arises from a complaint of retaliation pursuant to the Clean Air Act (CAA), 42 U.S.C. §7622 (1994), the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9610, and the Surface Transportation Assistance Act (STAA), 49 U.S.C. §31101. The complaint was filed on February 23, 1999 with the Occupational Safety and Health Administration (OSHA), United States Department of Labor. The complaint alleged Mr. Moore and other couriers' rights to raise concerns were violated when on January 25, 1999, the "Professionalism Team" issued "Recommended TSD Standards" that include chilling effects on environmental whistleblower and First Amendment rights of DOE employees. Mr. Moore received this document on February 22, 1999.

On April 6, 1999, after review of the Recommended TSD Standards, OSHA dismissed the complaint on the grounds that the document does not contain the necessary criteria which would constitute a complaint of discrimination under the Acts noted above.

The Complainant timely appealed the dismissal of the complaint. Pursuant to the direction of this Court, Complainant filed an Amended Complaint on May 13, 1999. On May 24, 1999, Complainant filed a Motion for Partial Summary Judgment and a Motion to Compel Discovery. On May 28, 1999, Respondent filed a Motion to Dismiss and a Motion to Stay Proceedings including discovery and the hearing set for June 15, 1999.

On May 28, 1999, a telephone conference was held with counsel for the parties. Mr. Slavin expressed his opposition to the Motion to Stay Proceedings and his desire that the hearing be held as scheduled. Mr. Slavin requested the Respondent's motions be faxed to him and he would file his reply by fax before midnight on June 1, 1999. I required Respondent to fax its motions to Mr. Slavin and gave Mr. Slavin permission to fax his reply to the motions before midnight on June 1, 1999. I delayed the pretrial exchange of witnesses and exhibits until June 7, 1999, and I delayed the time for Respondent to respond to discovery until after I had ruled on Respondent's motions.

Respondent's Motion to Dismiss is based on arguments that (1) the STAA explicitly excludes federal employees from its provisions; (2) the Civil Service Reform Act, 5 U.S.C. §§2301, et seq., is the Complainant's sole remedy; (3) the United States has not waived sovereign immunity under the CAA and CERCLA; and (4) the Complainant fails to allege essential elements of a prima facie case under the STAA, CAA and CERCLA.

DISCUSSION AND FINDINGS

STAA Jurisdiction

The rules of practice and procedure applicable to administrative hearing under environmental whistleblower statutes do not contain a section pertaining to motions to dismiss. However, §18.1(a) provides that in situations not provided for in Part 18, the Federal Rules of Civil Procedure apply. Federal Rule 12(b)(1) provides for motions to dismiss for lack of subject matter jurisdiction. Two types of 12(b)(1) motions have been recognized. A "facial" 12(b)(1) motion merely questions the sufficiency of the pleading, and in reviewing this type of motion, the court takes the allegations of the complaint as true. The second type of 12(b)(1) motion is a "factual" motion. When a court reviews a complaint under a factual attack, no presumption of truthfulness applies to the factual allegations, and the court is permitted to consider affidavits and documents submitted in support of the motion. Ohio National Life Insurance Co. v. United States, 922 F.2d 320 (6th Cir. 1990).

Respondent has made a "factual" jurisdiction challenge and submitted documents in support of its motion to dismiss. It is well-settled law that the burden of establishing jurisdiction is on the plaintiff. Where the party seeking dismissal on grounds of lack of subject matter jurisdiction makes a factual attack and presents affidavits or documents, the burden placed on the plaintiff is not onerous as he is required only to demonstrate facts which support a finding of jurisdiction in order to avoid a motion to dismiss. Moreover, the trier of fact must consider facts in light most favorable to the plaintiff. Welsh v. Gibbs, 631 F.2d 436 (6th Cir. 1980)

An "employee" under the STAA does not include ". . . an employee of the United States Government, a state or a political subdivision of a state acting in the course of employment." 29 C.F.R. §1978.101(d); 49 U.S.C §31101(2)(B); and an "employer" under the STAA does not include the United States Government, a state or a political subdivision of a state. 49 U.S.C. §31101(3)(B).

Attached to the Motion to Dismiss is the Recommended Decision and Order Granting Summary Judgment issued by Judge C. Richard Avery in Complainant's previous whistleblower complaint. Judge Avery cites the sworn complaint in which Complainant states that he has been a ten year employee of the Department of Energy as a special agent charged with transporting and guarding nuclear weapons and materials. Complainant has not challenged this representation and there appears to be no factual issue that at all times relevant Complainant was and is an employee of the United States Government. Therefore, I grant Respondent's Motion to Dismiss the Complaint under the STAA.

Sovereign Immunity/Exclusive Remedy Under CSRA

Respondent next asserts that the Secretary lacks jurisdiction over the subject matter of the complaint as sovereign immunity has not been waived and that the CSRA is the exclusive means for resolving employment disputes between federal agencies and their employees. The Secretary has rejected similar argument that the CSRA provides a preemptive and exclusive remedy for federal employee whistleblowers in Conley v. McClellan Air Force Base, 84-WPC-1 (Sec'y Sept 7, 1993) and Pogue v. United States Dept. of Navy, 87-ERA-21 (Sec'y May 10, 1990), *rev'd on other grounds*, Pogue v. United States Dept. of Labor, 940 F.2d 1287 (9th Cir. 1987).

There is nothing in either the CERCLA or CAA to suggest exclusion of government employees. The Secretary has specifically found that the CERCLA contains express language subjecting Federal agencies to its provisions, including its employee protection provisions. The Secretary has also found that Congress intended all the requirements of the CAA to apply to the federal government. William L. Marcus v. U.S. Environmental Protection Agency, 92-TSC-5 (Sec'y Feb 7, 1994). Therefore, I deny Respondent's Motion to Dismiss the Complaint based on sovereign immunity and that the exclusive remedy is under CSRA.

Failure to State Claim

The standard for dismissal for failure to state a claim upon which relief can be granted is set forth in Varnadore v. Martin Marietta Energy Systems, 92-CAA-2, 92-CAA-5, 93-CAA-1, 94-CAA-2, 95-ERA-1 (ARB June 14, 1996). The facts alleged in the complaint are taken as true, and all reasonable inferences are made in favor of the nonmoving party. A dismissal is purely on the legal sufficiency of the complainant's case. Even if the complainant proves all of the allegations in the complaint, he could not prevail. Even if the facts alleged are taken as true, no claim has been stated which would entitle the complainant to relief. (Varnadore, at 38-39).

Respondent bases this motion on Complainant's failure to state (1) that he has engaged in protected activity; (2) that Respondent knew of such activity; and (3) that he has been subjected to adverse action as a result of such protected activity. Under CAA and CERCLA, Complainant has the burden of proving these three elements and that he is a covered employee.

I recognize that pursuant to 29 C.F.R. §24.3(c) a complaint that is filed to begin an investigation is not required to be in a particular form. While the complaint filed in this case is sufficient to require an investigation by OSHA, in my pretrial order I required the filing of a formal complaint setting forth in detail the nature of each and every violation. Based on the standard set forth in Varnadore, it is clear that even if Complainant proved all of the allegations in the amended complaint filed pursuant to my pretrial order, he could not prevail. Thus dismissal for failure to state a claim is appropriate.

While dismissal for failure to state a claim might be appropriate, I find the dismissal should be without prejudice and Complainant should be given an opportunity to file an Amended Complaint.

ORDER

1. Complainant's complaint under the STAA is hereby DISMISSED for lack of jurisdiction.

2. Respondent's Motion to Dismiss based on Sovereign Immunity/Exclusive Remedy Under CSRA is DENIED.

3. Complainant's complaint under the CAA and CERCLA is hereby DISMISSED without prejudice for failure to state a claim upon which relief can be granted. On or before June 30, 1999, the Complainant shall file with the undersigned Administrative Law Judge and serve upon the Respondent an Amended Complaint.

4. Upon receipt of the Amended Complaint, the undersigned Administrative Law Judge will issue a pre-trial order setting forth the time requirements for filing responsive pleadings and discovery.

5. Respondent's Motion to Stay Proceedings is granted. The hearing scheduled for June 15, 1999, is hereby canceled.

6. All other relief sought by the parties in their respective motions is DENIED at this time without prejudice.

So ORDERED.

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LARRY W. PRICE
Administrative Law Judge